United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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FOR THE SECOND CIRCUIT

ILIGAN INTEGRATED STEEL MILLS, INC., CONTINENTAL INSURANCE COMPANY, STANDARD MARINE INSURANCE COMPANY LTD., ROYAL INSURANCE COMPANY, LTD., FIREMAN'S FUND INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY OF NEW YORK, EMPLOYERS COMMERCIAL UNION INSURANCE COMPANY and AETNA INSURANCE COMPANY,

Plaintiffs-Appellants,

—against—

SS JOHN WEYERHAEUSER, her engines, boilers, etc., WEYERHAEUSER COMPANY, and NEW YORK NAVIGATION COMPANY, INC.,

Defendants-Appellees-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR WEYERHAEUSER COMPANY, DEFENDANT-APPELLEE-APPELLANT

SYMMERS, FISH & WARNER,
Attorneys for Weyerhaeuser Company, Defendant-Appellee-Appellant,
345 Park Avenue,
New York, N. Y. 10022,
(212) 751-6400.

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Issues Presented for Review.

Is any liability of Weyerhaeuser (shipowner) for damage to cargo limited pursuant to the charter party, bill of lading and the United States Carriage of Goods By Sea Act to $500 per package?

May New York Navigation Company (charterer) recover from Weyerhaeuser (shipowner) its attorney's fees and expenses incurred in defending the action brought against it by cargo interests?

Statement of the Case.

This is an appeal by plaintiffs-appellants Iligan Integrated Steel Mills, Inc. *et al.* (cargo) and cross-appeals by defendants-appellees-appellants Weyerhaeuser Company (shipowner) and New York Navigation Company, Inc. (charterer) from a judgment of the District Court for the Southern District of New York for cargo interests in an amount limited to $500 per package and indemnity to the charterer, New York Navigation, against the shipowner, Weyerhaeuser. This action was brought by Iligan *et al.* against Weyerhaeuser, owner of the JOHN WEYERHAEUSER, and against New York Navigation, charterer of said vessel, to recover $3,000,000 for wetting, rusting, contamination, breakage and shortage of packages and pieces of steel manufacturing and electrical supplies and equipment shipped by Iligan from Baltimore, Maryland in December 1966 and consigned to Iligan at Iligan City, Republic of Philippines. The cargo was in apparent good order and condition when loaded and upon arrival at Iligan City a portion of the cargo was damaged. The damage resulted from leakage en-route through a hole which had developed in a sanitary line overboard discharge valve located in number 3 hold. Cargo contended that the shipowner and the charterer failed to exercise due diligence to furnish a seaworthy ship, that they did not properly and carefully carry, keep and care for the cargo, that they accepted the shipment at a time when they had knowledge that the vessel was grossly unseaworthy and that they knew that the vessel, while undergoing engine repairs at Panama Canal Zone en-route was taking an unusual quantity of water into the hold where cargo was stowed. Cargo further contended that the conduct of shipowner and charterer was such that they were not entitled to avail themselves of the $500 per package limitation of liability pro-

vision of the United States Carriage of Goods by Sea Act (hereinafter COGSA), 46 U. S. C. § 1304(5). The shipowner, contended (1) that the damage had resulted from a latent defect not discoverable by due diligence or other excepted causes expressly set forth in the charter party and in the bill of lading and (2) that due diligence had been exercised to make the ship seaworthy; alternatively that the shipowner was entitled to the benefit of the $500 per package limitation of COGSA, 46 U. S. C. § 1304(5); and alternatively that the shipowner was entitled to the benefit of the provisions of the revised statutes of the United States and the Acts amendatory thereof and supplemental thereto in limitation of the liability of shipowners, 46 U. S. C. § 183.

The complaint was filed on or about 23 March 1967. No *in rem* jurisdiction over the JOHN WEYERHAEUSER has been obtained. The shipowner appeared on 18 May 1967 and filed its answer on 20 June 1967. On 28 November 1969 the charterer filed its answer to the complaint and a counter-claim seeking indemnity against shipowner. On 26th February 1970 the shipowner filed its answer to charterer's counter-claim denying the charterer's claim for indemnity. Interrogatories were filed by shipowner to cargo and answered; there was discovery of documents and records. The deposition of S. I. Mandle (E. 318-390)*, Operations Manager of Weyerhaeuser was taken on 2 December 1969, the deposition of Captain Harold I. Dumble (E. 84-217), Master of the JOHN WEYERHAEUSER, was taken on 16 July 1970 and the deposition of Harold Baumgartner (E. 218-317), Marine

*Unless otherwise specified, references herein to the Joint Appendix, volumes 1 and 2, are designated by "R"; references to the volume of exhibits are designated by "E". The pertinent portions of the depositions of Captain Dumble and Messrs. Baumgartner and Mandle are in the volume of exhibits.

Superintendant of Weyerhaeuser was taken on 1 September 1971. The case came on for trial on 17 July 1972 before the late Honorable Edward C. McLean who died after the conclusion of trial and after briefs had been submitted, but before rendering his opinion. The case was reassigned to Honorable Robert J. Ward and, pursuant to a stipulation by counsel, he decided the case on the record made before Judge McLean. The opinion of Judge Ward is reported at 372 F. Supp. 859 (1974), (R. 28 a).

Judge Ward found: (1) Weyerhaeuser (shipowner) had failed to exercise due diligence to provide a seaworthy vessel and accordingly was liable to plaintiff, (2) there was no wilful misconduct or gross negligence on the part of Weyerhaeuser, (3) the terms of the United States Carriage of Goods by Sea Act, 46 U. S. C. § 1300 *et seq.* (COGSA) were applicable and Weyerhaeuser's liability limited to $500 per package of cargo, (4) New York Navigation (charterer) was liable to Iligan (cargo) for breach of warranty of seaworthiness, (5) New York Navigation's liability was also limited to $500 per package, and (6) that New York Navigation was entitled to indemnity from Weyerhaeuser, including its attorney's fee and expenses incurred in defending the action against it by cargo.

Statement of the Facts.

The JOHN WEYERHAEUSER was a vessel employed in the carriage of merchandise for hire by water and was owned and operated by Weyerhaeuser on the voyage involved. New York Navigation Company, Inc. was engaged in business as an ocean carrier of merchandise by water for hire and chartered the JOHN WEYERHAEUSER. The JOHN WEYERHAEUSER, a Liberty type steamship 7,176 gross tons, 441 feet 6 inches in length 57 feet breadth, 27 feet 9½ inches summer draft, compound

steam engine, built in 1944, was modified in 1961. In the modification program of 1961 part of the cargo holds were altered, certain bulkheads were removed and hatch coverings were refitted; the crew quarters were stripped down, scrapped and rebuilt. The cost of this modification was a little more than half a million dollars (E. 224, 225; E. 52, 53).

The JOHN WEYERHAEUSER was subject to annual inspections by the United States Coast Guard and by the American Bureau of Shipping (a ship classification society, hereinafter referred to as A. B. S.) as well as to periodic special surveys and to special surveys in the event of a casualty or when material repairs were made. The Coast Guard does not furnish inspection reports to shipowners but it does issue a Certificate of Inspection (without which an American vessel may not be navigated) upon satisfactory completion of any inspection. A complete file of A. B. S. reports for the years 1961 through 1966 inclusive was produced and certain of these were received in evidence. These include surveys at Philadelphia in June, 1966 (exhs. Z and AA), Singapore in September, 1966 (exh. Y), 2nd Special Periodical Survey No. 2 at Portland, Oregon in October, 1966 and subsequently (exhs. V and W), load line surveys, which include reference to sanitary discharge valves, of October, 1965 and 1966 (exhs. X and AB), surveys at Los Angeles in November, 1966 (exh. U), at Savannah in November, 1966 (exhs. S and T), at Bilbao (Panama, Canal Zone) in January, 1967 (exh. R) and at Pusan, Korea and Moji, Japan in February and March, 1967 (exhs. Q and P). In March, 1966 the vessel underwent a "Special Condition Survey for use by the shipowner's brokers in connection with their dealings with cargo underwriters" (E. 239, 240) in which the main deck, all cargo holds, shell plating above water, the areas particularly

subjected to corrosion, and tank top plating in all cargo hatches, were closely examined and found in good condition; plating of numbers 1 and 3 holds gauged, bilge system tested, operational test made of engine, boilers and machinery and steering gear which were found satisfactory, etc. The surveyor reported:

> The condition of this vessel hull, holds, spaces, machinery, pumping apparatus, boilers and equipment indicates satisfactory maintenance and the condition of this vessel is well above the average cargo vessel of this age group.

This finding is in accord with the report of cargo's surveyor Davies (R. 209a; E. 53) at Iligan. The ship was maintained in first class operating condition.

In the conversion of 1961, lower holds numbers 2 and 3 were transformed into a common hold with a cubic capacity in excess of any other hold in the vessel (exh. E. 6, E. 406). With the usual drag (draft of the vessel greater aft than forward) drainage was into two bilge wells or "rose boxes" located at the after end of the common hold, one on each side of the vessel. These bilge wells were boxes 7 feet in width across the ship, 18 inches deep and 18 inches long. The top of the bilge well was flush with the cargo bearing surface or ceiling at the bottom of the hold. Each bilge well had a capacity of 65 to 75 gallons and could be pumped in a reasonable short time (R. 381a-388a; exh. 40, E. 63). Two sanitary drainage or soil lines entered No. 3 hold from overhead close to the after bulkhead with the lines close to the skin of the ship on either side of the vessel. Each line led to a sanitary or storm valve several feet below the overhead. After passing through the valve the line turned at a right angle and passed through the skin of the ship to form an overboard discharge. The soil line dis-

charge valves were located about two feet beneath the 'tween deck and about 20 feet above the bottom of number 3 lower hold so that the overboard outlet was not submerged until the mean draft of the vessel reached about 25 feet 6 inches (R. 213a, 214a, 226a, 353a, 354a). The storm valve contained a clapper within its body. This clapper was not intended to be water-tight and to prevent access of water from outside into the soil line itself. It was designed to prevent the force of the seas outside causing a back up in the soil line into the toilets overhead (R. 364a, E. 376, 377). Irrespective of the clapper, no water could enter cargo spaces as long as the pipes and shells of the valves were intact.

Prior to the voyage in question JOHN WEYERHAEUSER made a voyage from Norfolk, Virginia to Madras, India where her cargo of ammonium sulphate was discharged during the period 11 August to 7 September 1967. On 7 September the vessel sailed for West Coast ports of the United States in ballast via Singapore for bunkers. At no time during the voyage to India and return to Portland, Oregon did the bilges overflow (deck log; exh. 75, E. 75). At no time was there any entry of water into number 2-3 cargo hold (E. 92, 93, 117, 156, 338). This common hold was carefully examined upon completion of discharge and there was no evidence of the entry of any water (E. 92, 117). On return of the vessel to Portland there was no indication of any leakage whatsover into number 2-3 hold (E. 338). There was no water damage to the cargo of ammonium sulphate carried to and delivered at Madras (E. 155, 156). Due to the lengthy period of discharge the cargo absorbed moisture from the air and gradually, progressively and uniformly throughout the vessel became caked (E. 156). The consignee did bring an action in the United States District Court for the South-

ern District of New York against the shipowner, but the claim was for short delivery only and for no other type of damage. (*Director General of India Supply Mission* v. *The S/S JOHN WEYERHAEUSER,* United States District Court, Southern District of New York, Docket No. 67 Civ. 3338). The captain believed that a pumping problem which occurred at Madras was due to a back-up from the bilge suction line, (E. 366). The engine log (exh. 33) has entries on August 16, September 1, 2, 9, 16 and 20, 1966 indicating continuing attention and repairs to bilge pumps, valve chests, valve springs, suction valves and cargo hold bilge strainers. There were no significant bilge soundings or pumping after these entries en route from Singapore to Portland (exh. 75, E. 75). On arrival at Portland in addition to generator and voyage repairs (E. 313, 357, 358) the ship also underwent a Biennial United States Coast Guard inspection and an A. B. S. 2nd Special Periodic Survey No. 2 and Load Line Survey, (exhs. V, W, and X). Marine Superintendent Baumgartner attended with the surveyors, although not constantly at their side. He entered number 2-3 hold and made an examination as to whether the vessel had sustained any damage from cargo operations that had not been reported. He testified that if a sanitary line had been leaking there would be a foul odor and if there had been any leak through a body valve or a gasket there would be signs of salt rust and corrosion running down the side of the ship. He saw no evidence of any such leakage (E. 314, 315, 316). As shown by all the surveys, there was no evidence of any leakage into No. 3 cargo space. There had been and was no report from any vessel personnel that there was any problem in that area (voyage correspondence, exhs. B3-B10 inclusive; E. 244, 245, 287, 330, 332, 338). A. B. S. rules do not require a sanitary discharge valve to be opened for inspection more often than once in

every four years (E. 270, 271). The discharge valves were in fact opened examined and found in good order in both 1962 and 1965. Mr. Baumgartner was present when the valves had been opened and personally examined them (E. 233-239, 302). The sanitary discharge valves were not opened in 1966, but were included in the general visual inspections (E. 87-92, 126, 131, 314-316). Cargo's surveyor Berke testified that it is not the generally accepted practice to hammer test a valve before each cargo is loaded (R. 426 a). It was found after the casualty that the discharge valve that failed had become wasted on the inside, but that except for the particular area where wastage occurred, the metal in the valve was sound and externally presented a good appearance (R. 433, 335; E. 269). Both Operations Manager Mandle and Marine Superintendent Baumgartner were positive that at no time prior to the arrival of the vessel at Moji enroute to Iligan City had they received any oral or written reports about any leakage or back up of water into No. 3 bilges.

After completing repairs, inspections and surveys at Portland the vessel loaded a full cargo of wet, green lumber (E. 133) at Longview, Aberdeen, and Coos Bay and sailed from Coos Bay on 31 October for Boston and Portsmouth, Rhode Island. On several days during this voyage there were entries of 20 or 24 inches in one or the other of the No. 3 bilges. On this inter-coastal voyage the soil line discharges were either on the water line or 6 inches above (exh. 75). On an inter-coastal voyage, such as this, with transit from cool climate to tropics and return to cold climate it was normal for there to be substantial sweating and drainage from the wet lumber. Both of cargo's surveyors Berke (R. 417a, 418a) and Captain deBouthillier (R. 550a) agreed on this. Numbers 2 and 3 were a common hold with bilge wells at the after end of number 3 and

the common hold was far greater in size than numbers 1, 4 and 5 so that more accumulation was to be anticipated in the number 3 bilges. The ship's logs and exhibit 75 show substantial accumulation in the other holds as well, with soundings up to 13 inches in number 1, 17 inches in number 4 and 18 inches in number 5. The inter-coastal soundings are properly attributable to sweat and drainage. After completing discharge of the lumber cargo the vessel proceeded to Baltimore where on 12 December 1966 she was delivered by the shipowner to New York Navigation Company under time charter, Government form as approved by the New York Produce Exchange, as modified, dated 7 September 1966 for a voyage from the East coast of the United States to the Far East (E. 342; exh. E-2, E. 391). At the time of delivery an on-hire survey was conducted by Captain J. B. Rynbergen with the Chief Officer and further survey was made by representatives of the National Cargo Bureau (E. 361, 362). An inspection of the holds was made by Captain Rikkers acting for charterer (E. 95, 96, 204, 390). All cargo compartments and adjacent decks areas were examined and were found in general good order and condition (E. 361, 363), "The hull, deck machinery, hatch covers, etc. appeared to be in good repair and to have been well maintained" (exh. 17; E. 53; see also E. 239, 240 re the special Condition Survey of 30 March 1966). Prior to loading, the charterer erected a non-watertight wooden bulkhead between numbers 2 and 3 holds, made of 2" x 8" and 2" x 10" sheathing nailed to vertical 8" and 10" dimension timbers. Similar bulkheads were provided in the 'tween decks. These bulkheads were then covered with burlap (exh. 17, E. 53). Loading at Baltimore commenced at 0800 hours on 12 December and was completed at 1500 hours on 16 December (see deck log; see also exh. E-7; E. 407). 2,000 tons of mill machinery, factory equipment and supplies were loaded in numbers 2

and 4 lower holds and 'tween decks with 224 tons of this amount being loaded on-deck and across numbers 2 and 4 hatches (there is no issue here involving the on-deck cargo). The cargo was shipped under New York Navigation Company form Bill of Lading, No. 1, dated at Baltimore, 16 December 1966. Shipper was stated as "Iligan International Corp. for Iligan Integrated Steel Mills, Inc. Mindanao, Rep. of Philippines." The bill of lading was endorsed "Straight Bill of Lading—Not Negotiable" (exh. 8; E. 35).

At Baltimore bilge soundings were routine until 15 December 1966 when 18 inches were found in number 3 port bilge (the soil lines were more than 12 feet above water level, see exh. 75, E. 75). Captain deBouthillier, cargo's expert, testified that on the day before these soundings at Baltimore the log reported very heavy snow and rain requiring suspension of work and also that the carpenters were unable to close number 3 hatch (R. 631a, 632a). There were also 12 to 15 inch readings in number 1 and 18 inches in number 5 bilges (exh. 75). The bilge readings at Baltimore were due to working the vessel with open hatches during snow and rain. The vessel sailed at 2130 hours on 16 December for Tampa, Florida where she arrived at Tampa sea buoy at 0012 hours on 22 December. At Tampa the vessel on 22 and 23 December, after a further survey of the holds, loaded in numbers 1, 3 and 5 lower holds and 'tween decks 6,996 tons of triple super phosphate in bulk, shipped by Chemoleum Corp. of New York consigned to Bank of Korea. The pre-loading survey at Tampa was conducted by Captain Record on behalf of the National Cargo Bureau. Captain Record had held a masters license for 22 years, and had sailed as master for 7 years (R. 667a, 692a). His first inspection was while the ship was still at anchor and the hatches probably closed

on his first visit. He found that number 3 hold required more cleaning. Cleaning was undertaken and a second inspection was made over two and a half hours later after the ship had docked. Captain Record considered that further cleaning was necessary and he remained there for over an hour until the further cleaning had been done to his satisfaction (R. 666a, 672a, 673a, 686a, 688a). His inspection was to determine that the cargo carrying areas were dry, clean and suitable for loading. He looked all over the compartment (R. 668a). He checked the burlap covering the bilge strainer plates (R. 668a, 675a, 676a). After general cleaniness of the compartment, the main factor that he insisted upon was that the compartment where the cargo was to be loaded be absolutely dry. He looked for moisture or traces of water and there were none. There was no indication of any leaking because there was no moisture present (R. 670a, 671a). There was no water on the tank tops or on the ship's side. "There was no trace of moisture anywhere" (R. 672a). There was no smell of sewage (R. 677a). It was he who issued the loading certificate (N. Y. Nav. Exh. E). At 1920 hours on 23 December 1966 the vessel sailed from Tampa for Korea via the Panama Canal (damage sustained by the phosphate loaded at Tampa is not at issue in this case). The vessel arrived at Cristobal, Canal Zone, at 0800 hours on 29 December for bunkers and repairs to the main engine necessitated by misalignment of a high pressure piston rod components and a fractured crosshead (E. 98, 248, 249, 347, 348). Engine repairs commenced at 0700 hours on 30 December under the supervision of the American Bureau of Shipping. Repairs were completed at 1446 hours on 13 January 1967 and a certificate of seaworthiness was thereupon issued by the American Bureau of Shipping (see A. B. S. report, exh. R).

From Baltimore to Tampa bilge soundings were normal. At Tampa 25 tons fresh water were taken on board. The vessel sailed on the evening of 23 December for the Canal Zone with a mean draft of 26 feet 4 inches. Commencing on 24 December there were soundings in excess of 18 inches in number 3 port bilge. There were 2 inches on arrival Cristobal, C. Z. on the morning of the 29th and 38 inches in the afternoon while bunkering and taking on fresh water. At this time the master tasted the bilge water and found it fresh (E. 97-100, 166, 167, 181, 182). Thereafter during the 14 day stay at the Canal Zone soundings were normal except on 6 and 7 January when fresh water was again taken on board. The engine log shows that trash was removed from number 3 port cargo hold bilge valve on 26 December and the bilge pump rods were repacked the next day. Further repairs were made on 28 January and 4 February 1967 when a broken disk guide was replaced, disk machined and ground in and rubber lining installed. Except as noted the number 3 port bilge soundings were normal during the time the vessel was at the Canal. At no time during the voyage were the soundings in the number 3 starboard bilge in excess of the depth of the bilge. The master reasoned that the soundings in number 3 port bilge were due to a back up of fresh water through the bilge system during and after the taking on of fresh water. He presumed it was coming from some place in the engine room (E. 181, 182), that he had the problem under control through maintenance work performed and pumping, and that he could continue the voyage safely from the Panama Canal (E. 100, 350). Neither the Master nor the Chief Engineer nor any other vessel personnel made any report of any problem concerning leakage or pumping to the Company's supervisory staff, either during the previous foreign voyage, the previous inter-coastal voyage or the voyage in question until the vessel arrived at Moji (E. 245-249, 287, 301, 302, 338, 348, 354, 365, 380).

At 1859 hours on 13 January anchor was aweigh and vessel commenced transit of Panama Canal. During the 40-day trans-Pacific passage to Moji, Japan where the vessel intended to take bunkers, the weather was not unusually severe, although during the period February 15-17 the vessel encountered winds up to force 7 and seas up to force 6, which caused the vessel to roll and pitch heavily. Cargo holds were inspected by the Chief Officer to the extent permitted by the nature of the cargo stowage on 31 December 1966, 20 January and 3 and 13 February and found in good condition. These inspections were recorded in the ship's log (deck log; E. 143, 190, 191). The vessel arrived at Moji quarantine anchorage on 22 February. At the time of anchoring the vessel appeared to the master to be out of trim and down by the head. He personally found the draft to be such that the vessel was almost down to her summer marks. The chief mate again checked the cargo holds entering number 3 hold first (E. 101, 355). He found that the phosphate had settled along the forward bulkhead and the sides and that the surface of the phosphate on the periphery of the stow was wet. On further inspection sea water was found entering through a hole in the overboard discharge valve of a sanitary line which entered the port after corner of number 3 lower hold from overhead (E. 102, 355, 23; Davies and Watts reports; exhs. 17 and E-11; E. 52, 408). This hole, which was about 1¼" x ¼" in size (E. 102, 109), was located on the underside of the horizontal portion of the valve at the point (inboard of the clapper in the valve) where the diameter of the discharge line increases from 4" to 5" (R. 355a; E. 102). Number 2 lower hold was flooded to a depth of 13 feet so that much of the stow of cargo was submerged. It was also apparent that a large quantity of phosphate had been carried along with the water which had entered number 2 lower hold (E. 194).

Shoreside assistance was obtained at Moji and pumping was carried out by Sasebo Heavy Industries Co. and continued from the midnight of 22 February to the morning of 25 February at which time the consistency of the phosphate mixture prevented further pumping. During this period Sasebo also installed a cement box around the leaking valve and since leakage had been suspected around the cover plate and flanges of the valve on the similar soil line on the starboard side, as a precautionary measure, a cement box was installed on that valve as well (exhs. 17 and E-11; E. 52, 408). Various surveyors attended on board the vessel on 23 February and subsequently (E. 104, 105). Under water inspections were made by divers on 23 and 24 February. Divers found a small setting out of a plate at number 2 hold and several places where paint had been scraped off. No cracked plate was found and no dents or damage were found in way of number 3 hold. No leakage through any of the shell plating or any source other than the sanitary line discharge valve was found after discharge at Iligan or after the return of the vessel to the United States (E. 87-92, 338, 363, 374, 386; A. B. S. and Davies and Watts reports). The cement box on the valve on the starboard side was not disturbed until after the vessel returned to the United States at which time that valve was found to be in good order and condition and in proper working order (E. 355, 356; R. 415a). The vessel sailed from Moji on 26 February and arrived at Mokpo, Korea on 28 February (see deck log). Discharge of phosphate into barges commenced shortly after arrival at Mokpo and was accomplished without difficulty in numbers 1 and 5 holds. Discharge from these holds was completed on 7 March. An additional eleven days were required to discharge the phosphate carried in number 3 lower hold. At Mokpo the cement box on the port valve was removed. A hard patch, or weld,

was placed over the hole. The valve was then reinstalled. Both port and starboard valves were hose tested in place and found tight and an A. B. S. seaworthiness certificate was received. On 18 March the vessel sailed for Moji where she called briefly for bunkers on 19 March, sailing again for Iligan on 20 March and arriving and docking at Iligan City on the evening of 26 March.

At Iligan the vessel was attended throughout the course of discharge by numerous representatives of all parties concerned (exh. E-11, E. 412-414). Except for the discharge valve on the port soil line in number 3 lower hold, the hull, deck machinery, hatch covers etc., were found to be in good repair and to have been well maintained. The cement box on the starboard valve was not examined at this time except through hose testing. Nothing was done to the port valve at Iligan (survey reports; R. 351a, 357a). On return to Alameda, California from Iligan the starboard valve was found to be in good order and continued in service (R. 358a, 359a; E. 355, 356; A. B. S. reports). The port valve was brought on deck and examined by surveyors for cargo and the shipowner (E. 105; R. 358a, 433a, 435a). The port clapper valve when inspected appeared sound externally, save the wasted area around the end of the seat where the holed wasted area had been built up by welding at Mokpo (R. 365a, 368a, 369a, 301a). The body of the valve was taken to the shop and quartered. This enabled the people in attendance to garner a representative idea of the cross sectional steel in the port clapper valve. File tests were made. The body of the valve appeared in good order, save the bottom portion approximately 4 inches long by approximately ½" wide by the depth of the casting in varying amounts to ⅜ of an inch that had been filled with weld metal. Photographs were taken and a new valve installed, (E. 356). Except for some minor pilferage, the cargo in number 2 'tween deck, number 4 'tween deck and

lower hold and on deck was found at Iligan City to be in good order (see Davies and Watts reports, exhs. 17 and E-11). The water and fertilizer in number 3 lower hold had formed a slurry which had penetrated the temporary bulkhead between numbers 2 and 3 cargo compartments. Some of the cargo in number 2 lower hold was in good order and condition; some cargo was cleaned and repaired at Iligan; some cargo was abandoned as worthless and other cargo was returned to the United States for reconditioning and repair. (Details as to cargo damage are set forth at length in the Davies and Watts reports, exhs. 17 and E-11; E. 52 and 408).

Argument.

Appellant Weyerhaeuser (shipowner) submits that it exercised due diligence to provide a seaworthy vessel and that it is not liable by reason of damage to cargo. The argument on behalf of Appellant Weyerhaeuser (shipowner) in this brief is mainly directed to the right of shipowner to limitation of all liability to $500 per package. The findings of fact made by the Court below that there was no gross negligence or willful wrongdoing on the part of either supervisory personnel of the shipowner or the master or crew were in complete accord with the evidence and clearly correct.

Shipowner further submits that it is not liable to the charterer for attorney's fees and expenses incurred in defending any action brought against it by cargo based upon any contract other than the charter party or the bill of lading.

POINT I.

PURSUANT TO THE CHARTER PARTY INCORPORATING COGSA AND THE BILL OF LADING THE LIABILITY OF SHIPOWNER TO CARGO IS LIMITED TO $500 PER PACKAGE.

The United States Carriage of Goods by Sea Act, Title 46 U. S. C. § 1300 *et seq.* applies by its own force to the relations between cargo interests and shipowner. *Nichimen Company* v. *M. V. FARLAND,* 462 F. 2d 319 (2d Cir. 1972); *Demsey & Associates* v. *S. S. SEA STAR,* 461 F. 2d 1009 (2d Cir. 1972); *In Re MARINE SULPHUR QUEEN,* 460 F. 2d 89 (2d Cir. 1972); cert. den. 409 U. S. 982. Moreover, the terms of COGSA were expressly incorporated in the bill of lading by paragraph 1 thereof (exh. 8A, E. 35). If a shipowner is found to have failed to use due diligence prior to the commencement of the voyage to provide a seaworthy vessel it is entitled to the benefit of the United States Carriage of Goods by Sea Act (COGSA), Title 46 U. S. C. § 1304(5) which provides as follows:

> (5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

Failure to use due diligence imposes liability for damage resulting from unseaworthiness. Section 1304(5) of COGSA assumes the establishment of such liability but, if no value is declared and inserted in the bill of lading, limits the

amount thereof to $500 per package, except for goods not shipped in packages, and as to such goods limits liability to $500 per customary freight unit. The Court below properly held that the provision of the bill of lading setting forth the package limitation does so with the same effect as COGSA, 372 F. Supp. 859 at 869. In its appeal, cargo's thrust is an attempt to avoid the limitation by urging that there was in effect a deviation that displaces the bill of lading rendering COGSA inapplicable and making the shipowner liable as a common law insurer. In fact there was no "deviation." Moreover, there was no concealment or misrepresentation by the shipowner and cargo's reliance upon *The SARNIA,* 278 Fed. 459 (2d Cir. 1921), *Olivier Straw Goods Corp.* v. *Osaka Shosen Kaisha,* 47 F. 2d 878 (2d Cir. 1931) and *The FLYING CLIPPER,* 116 F. Supp. 386 (S. D. N. Y. 1953), (appellant's brief, pages 40, 41) is misplaced.

"Deviation" may be defined as "a voluntary departure without necessity or any reasonable cause from the regular and usual course of the ship insured". *Constable* v. *National Steamship Co.,* 154 U. S. 51, 66 (1894). Here there was no departure from the agreed geographical route. Cargo interests urge that a ship may be held liable "as for a deviation" on the grounds that there had been such a fundamental breach that the carrier had entered upon "a different venture from that contemplated" and the contract should be avoided in its entirety. The cases of deviation and liability "as for deviation" have been collected and discussed in 33 A. L. R. 2d, 145-210 (1954) under the Annotation: "Carriers—Deviation" and 80 C. J. S., Shipping, § 144, p. 1007 *et seq.* Lack of due diligence, whether of the owner or the master, to furnish a seaworthy vessel does not abrogate the contract of carriage. *The MALCOM BAXTER, JR.,* 277 U. S. 323 (1928); *Kish* v. *Taylor*

[1912] A. C. 604 (House of Lords); *Royal Ins. Co., Ltd.* v. *United States,* 87 F. 2d 714 (2d Cir. 1937); *The TURRET CROWN,* 297 Fed. 766 (2d Cir. 1924); cert. den., 264 U. S. 591; *The CALEDONIER,* 31 F. 2d 257 (2d Cir. 1929); cert. den., 279 U. S. 865; *The WAALHAVEN,* 36 F. 2d 706 (2d Cir. 1929); cert. den., 281 U. S. 747. In *United States* v. *Wessel, Duval & Co.,* 115 F. Supp. 678 at 684 (S. D. N. Y. 1953), the court restated the rule:

> The United States is therefore left only with the claim that failure to use due diligence to make the ship seaworthy can amount to a deviation. Nothing like such conduct on the part of a carrier has ever been given the effect of deviation. The farthest that I have found the courts going away from the original conception of a departure from the ship's route is their acceptance of a breach of contract for special stowage of cargo as a deviation.

In both *The MALCOLM BAXTER* and *Kish* v. *Taylor* the vessels because of unseaworthiness existing at the time of their departures proceeded to ports of refuge. In *The MALCOLM BAXTER* the vessel had a "hog" or camber in her keel, a structural weakness that caused leakage in heavy weather. Although a survey did not disclose the condition it was found that the unseaworthiness should have been discovered by due diligence. In *Kish* v. *Taylor* the vessel was overloaded by her master in a foreign port. In both cases it was held that a deviation caused by the unseaworthiness was not a "voluntary deviation" and did not displace the bill of lading. In *Royal Ins. Co., Ltd.* v. *United States,* 87 F. 2d 714 (2d Cir. 1937) there was spontaneous combustion in old coal which had been heating and which the owner's operating manager had been requested to move. Although the manager had been advised that it was necessary to move the coal he directed the

vessel to sail without this being done. The facts set forth in detail in *Arkell & Douglas, Inc.* v. *United States,* 13 F. 2d 555 (2d Cir. 1926); cert. den., 273 U. S. 735, were accepted by stipulation in *Royal Ins. Co., Ltd.* v. *United States. Arkell* held that the limitation statute, 46 U. S. C. §§ 182, 183, could not be applied due to the negligence and privity of the shipowner. This Court in *Royal Ins. Co., Ltd.* v. *United States* ruled that the notice provisions of the bill of lading were not displaced and declared that gross negligence which it equated to deliberate intention or wilful wrongdoing is requisite for a finding of deviation. The Court below found, 372 F. Supp. 859 at 865, that Weyerhaeuser (shipowner) "did not have actual knowledge of the unseaworthy condition of the ship prior to the trans-Pacific voyage in question", and, further at page 868, "There was here no wilful and wanton misconduct". These findings are clearly correct and are fully supported by the evidence.

In 1961 the JOHN WEYERHAEUSER underwent extensive conversion and modifications at a cost of a little more than $500,000. Annual A. B. S. classification and load line surveys were carried out at that time (E. 224, 225). 2nd Special No. 1 Hull and Machinery Survey was completed in 1962 (E. 233, 234). In 1963, 1964 and 1965 annual classification and load line surveys were made. In October 1966 at Portland, Oregon the vessel underwent a Biennial Coast Guard Survey and A .B. S. 2nd Special No. 2 and Load Line Surveys (E. 87, 88). All inspections and surveys reported the vessel seaworthy and in good operating condition. The annual load line inspection form at item 8 contains a reference to "Scuppers and Sanitary Discharge-Valves." The Coast Guard and A. B. S. rules require the inspection of soil line discharge valves only once every four years (E. 270, 271, 383). The valve has a rectangular steel cover which can be removed for internal examination

(R. 356a, 357a). At other times there was visual examination (E. 271, 272, 290). Marine Superintendent Baumgartner personally examined the opened soil line valves at the time of the load line inspections in 1962 and 1965 (E. 233-239, 302, 303) and found them in good condition. On the prior voyage to India with a cargo of ammonium sulphate and return to Portland, Oregon in Ballast, 26 June to 15 October 1966 there was no entry of water into cargo holds. The holds were inspected by the master after discharge in India and again at Portland and there was no evidence of any leakage into the cargo spaces (E. 91, 92, 117, 156, 338). On return to Portland in October 1966 generator and voyage repairs were made (E. 109, 357, 358). The ship also underwent Biennial Coast Guard Inspection and A. B. S. 2nd Special Periodic Survey No. 2. At Portland, during a conversation with Mr. Baumgartner and Commander Rohnberg of the Coast Guard (since deceased) Captain Dumble received an oral report from Commander Rohnberg (E. 89, 90, 182, 189, 190):

> He said that he had checked our sanitary storm valves, and he was remarking to Mr. Baumgartner what good condition they were in, he found them in very good condition.

At Portland, as shown by the surveys and evidence, there was no indication of any leakage from the sea into number 3 cargo space. There was no report from the vessel that there was any problem in that area (E. 244, 245, 287, 330, 332, 338). Mr. Baumgartner was in all the holds looking for any sign of cargo damage (E. 313, 314, 316). Bilge readings on the voyage from Portland to Boston with a soaking wet cargo of lumber (E. 133) were due to drainage from the lumber and the inevitable sweat to be anticipated in a voyage from a cold climate through the tropics

and back to a cold area (E. 129-133). That readings on occasions were greater in number 3 hold than in numbers 1, 4 and 5 was to be anticipated in that numbers 2 and 3 were a common hold, a very much larger space, with all drainage into the after end of number 3. Surveys and examinations on number 3 hold were held at Baltimore and Tampa by experienced surveyors for owner and charterer, by the National Cargo Bureau, by representatives of the shippers and by the master (E. 94-96, 389, 92, 93). At no time was any sign of leakage found. If there had been leaking into the ship through the body of the valve or through a gasket leaking, there certainly would be indications of salt, rust and corrosion running down the side of the ship, perhaps on the tank top (E. 93, 315, 316; R. 425a, 426a). Additionally if the soil line in constant use had been involved there would have been a foul odor and possibly some excrement. There is no question that the sole source of entry of the seawater that damaged plaintiffs' cargo was a hole in the shell of the port soil line overboard discharge valve in number 3 hold. The surveyors all agreed on this point. Some leakage was suspected at Moji from the flange and gasket of the starboard valve (E. 266, 355, 356, 386; R. 380a; see survey reports). A cement box was placed over the starboard valve at Moji and at the end of the voyage it was dismantled and found to be in good order and condition (E. 355, 356; R. 396a, 397a). No other source of entry was found and there was no leakage on subsequent voyages (E. 386; see log books). There was no leakage from the port number 3 valve prior to departure from Tampa. Any such leakage would have been obvious and observed at Madras, Portland, Baltimore and Tampa.

Cargo contends that there was an abnormal pumping of both port and starboard number 3 bilges at Madras on the prior voyage to India, that this came from the number

3 port soil line valve and that investigation of the source of water would have disclosed a defect in the soil line valve. In fact water in number 3 bilges never rose to a height to overflow into the cargo spaces (see bilge sounding records in deck logs; maximum soundings were 15 inches; the bilges were 18 inches deep). There was no water damage to cargo (E. 117, 155, 156, 338, 390). Cargo's inferences from the Mandle deposition are wrong. In his deposition (E. 332) Mr. Mandle said he was unaware of any difficulty at Madras. He did not inquire into the reason for delay in discharging cargo. There were communications with shipowners agents, which were called for, and produced in the form of a charter file that contained voyage reports and correspondence regarding the cargo, marked for identification as exh. 7, identified at trial as Wey. exh./id E-1, and reviewed by both Mr. Mandle and plaintiffs' counsel. Mr. Mandle then testified that the file showed that *weather* conditions slowed discharge and got the cargo wet, which further showed the rate of discharge (E. 334). He did not say that there was leakage into the cargo hold. What he did say (E. 338) was:

> I will say I'm sure there was no leakage from the sea into the cargo space during the period.

He further said that the caking problem did not result from leakage through the sanitary line valve (E. 390). There was no evidence of damage by sea water at Madras. Captain Dumble testified he found no indication of entry of seawater into the hold (E. 92); after discharge there was no evidence of any leakage in that hold. The cargo in *all* holds was caked at Madras from gradual absorption of moisture from the air. (E. 155, 156). Claim for shortage only was made by the consignee of this cargo in *Director*

General of India Supply Mission v. *SS JOHN WEYERHAEUSER,* U. S. D. C., S. D. N. Y., docket number 67 Civ. 3338. The water in bilges at Madras could *not* have been from an incursion of sea water through the soil line valve because by 13 August 1966, two days after discharge commenced, the valve was out of water and yet frequent pumping continued for another month (see engine log entries). Soil line drainage, of course, would have been continuous and obvious. The hold was examined when empty and no leakage was found, of sea water or soil line waste or from any other possible source except backup from the bilge suction line. Mr. Mandle testified (E. 366):

> Q. The backup from the bilge system means what?
> A. The normal ship condition will be where the bilge pump lined up with the suction valve closed on the pump. The discharge valve is usually left open, the overboard valve to the sea is usually left open.
>
> On an older piece of equipment, or equipment that has debris in it, there is a possibility that you can have a leaking valve through the pump, through the suction and discharge valve back by your plunger packing and back to the manifold leading to the holds.

There were numerous log entries as to attention and repairs to bilge pumps, bilge valves, suction valves and bilge strainers (engine log, exh. 33). There were no significant bilge soundings or pumping thereafter en route from Singapore (bunkers stop) to Portland (E. 119). As set forth in the statement of facts, *supra,* the few high bilge readings on (1) the inter-coastal voyage and (2) at Baltimore were due (a) to sweat and drainage from green, wet lumber and (b) to accumulation that incurred while load-

ing during snow and rain and also when the hatch covers could not be closed during a snow storm.

Captain Dumble testified that on return to Portland from India he had told Mr. Baumgartner orally that he had water in the bilges after taking fresh water and that he wanted to make sure a plate wasn't cracked and wanted to know if they could have a flow back from the manifold (E. 117, 118, 120, 121). Mr. Baumgartner had no recollection of any such conversation (E. 246-249, 284-287). He said (E. 246),

> Well, had there been any pumping problem with any bilge in any part of the ship, I would have certainly investigated it, and located, if I could, his troubles and take immediate steps to correct them. The ship was empty and the opportunity was there.

Capain Dumble further said that the plate was checked, that there was no crack in it and that Mr. Baumgartner had told him that there was nothing that he could find that would throw back fresh water into the bilge. There was no mention of any pumping problem in any of the letters from the Captain or Chief Engineer from the Far East to the home office (exhs. B2-B10). There was no possible causal relation between bilge pumping in India and the soil line. It is clear that the master was convinced that any pumping problem that he may have had at Madras had been resolved and that all requisite maintenance and repairs had been accomplished. Messrs. Mandle and Baumgartner testified and all records confirm that at no time was there any report, oral or written, to shoreside supervisory personnel of any problem concerning leakage or pumping prior to arrival of the vessel in Japan on the Iligan voyage (E. 245-249, 287, 338, 348, 354, 365; exh. B2-B10 inclusive). The vessel was detained at the Canal Zone for engine repairs (which have no causal relation to this casualty) which were made

under the supervision of the local A. B. S. surveyor (exh. 17; E. 98, 99, 248, 249, 347-351, 365-368; exh. R). No Weyerhaeuser supervisory representative attended at the Canal. At no time prior to arrival of the vessel in Japan was any written or oral report of any leakage into cargo areas made to defendant Weyerhaeuser's shoreside personnel (E. 98, 99, 150, 173, 174, 178, 245, 248, 249, 287, 301, 302, 338, 348, 350, 351, 365, 389) and there was no intervention in the general operation and management of the ship. Captain Dumble testified (E. 98, 99):

A. Well, we went to the shipyard in Cristobal to have the engine repaired, and we pumped out the bilges.
Q. Did you make any report to the company, to surveyors or agents at the Panama Canal concerning pumping of bilges?
A. Not at the Panama Canal we didn't.

Mr. Mandle testified (E. 350):

A. Apparently, in the opinion of the master, they had found the source and did not consider it to be a serious problem.
Q. What was the source?
A. They felt it was leaking back through the bilge system.
Q. Did they make any report to you on that?
A. No.
Q. How did you obtain this information?
A. Subsequent to the end of the voyage.
Q. You interrogated the master?
A. Yes.

On 26 and 27 December 1966, 28 January and 4 February 1967 there were log entries of removing trash from #3

port cargo hold bilge valve, packing bilge pump, repairing the bilge valve and installing a rubber lining on the valve deck. Mr. Mandle continued (E. 350, 351):

Q. He reported to you after the voyage that he made an investigation

A. Yes.

Q. While at Panama?

A. Correct—not an investigation; they felt they had discovered the source.

Q. How would he have discovered it if he did not investigate it?

A. The investigation conducted by them led them to believe that the water was backing up through the bilge system.

(E. 365, 366):

Q. Further, in your discussions with the master, you learned they thought it was a backup from the bilge system; is that correct?

A. Correct. Also fresh water; they tasted fresh water.

It is clear that there was no written or oral report from the vessel to supervisory personnel while the vessel was at the Panama Canal of any leakage into number 3 hold and that there was no intervention by supervisory personnel at the Panama Canal. If there was negligence of the master at the Panama Canal, it was a fault of management for which the shipowner is not responsible. *May* v. *Hamburg etc. Gesellschaft,* 290 U. S. 333 (1933) at 345; *J. Howard Smith, Inc.* v. *S/S MARANON,* 2d Cir., decided 25 July 1974, Docket No. 73-1921. The record eloquently shows that the master had good reason to believe that he had

solved the pumping problem in India, that bilge water on the inter-coastal run was due to drainage from a cargo of wet lumber and sweat, that the full bilge well at Baltimore was due to melting snow and rain, and that at Christobal he had a recurrence of an old problem of back-up of fresh water while taking fresh water on board. The engine log shows recurring attention to the bilge pumping system at Christobal. At the Canal Zone the soundings did not show a depth of water in the cargo spaces of 2 feet and on only three days out of the fourteen day stay did they show more water than the depth of the bilges and this was during or immediately after taking on fresh water (E. 98-100, 163, 164; see also deck and engine logs). Significantly at no time from Tampa to Japan was there any excess sounding in number 3 starboard bilge such as would have been anticipated from a general flooding condition in the hold. The ruling of the Court below that shipowner is entitled to the benefit of the package limitation was clearly correct.

POINT II.

WEYERHAEUSER COMPANY (SHIPOWNER) SHOULD NOT BE REQUIRED TO INDEMNIFY NEW YORK NAVIGATION COMPANY (CHARTERER) FOR ANY LIABILITY TO CARGO IN EXCESS OF THE LIMITATION SET FORTH IN COGSA.

The Court below has held the charterer liable to cargo interests on the basis of COGSA limits of $500 per package, the same limits of liability that it set against the shipowner. If its holding is affirmed the following discussion is moot except insofar as it sets forth principles pertinent to charterer's claim for attorneys' fees and expenses of defense. If, however, charterer should be held liable to

cargo for a greater amount, there should be no recovery of that amount from the shipowner by the charterer.

New York Navigation (charterer) has contended that Weyerhaeuser (shipowner) in the charter party between them fully warranted the seaworthiness of the vessel so that there is no distinction between the duties owed by shipowner to charterer and by charterer to cargo and the obligations arising therefrom. The charter party does not contain a warranty* but only an obligation defined in terms of COGSA. Clauses 8 and 24 of the charter read as follows:

> 8. That the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with ship's crew and boats. The Captain (although appointed by the Owners), shall be under the orders and directions of the Charterers as regards employment and agency; and Charterers are to load, stow, and trim *and discharge* the cargo at their expense under the supervision of the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts, *without prejudice to this Charter Party.* (The italicized words are typewritten inserts).
>
> 24. It is also mutually agreed that this Charter is subject to all the terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States approved on the 13th day of February, 1893, and entitled "An Act

*There is no distinction to be drawn between any warranty to be implied from the charter wording and the COGSA obligation as to "time of delivery" and "time of sailing" for COGSA § 1303(1) provides that the carrier "shall be bound, *before* and at the beginning of the voyage, to exercise due diligence to (a) make the ship seaworthy . . ." (emphasis added).

relating to Navigation of Vessels, etc.," in respect of all cargo shipped under this charter to or from the United States of America. It is further subject to the following clauses, ~~both of~~ which ~~are~~ *is* to* be included in all bills of lading issued hereunder:

U. S. A. Clause Paramount

This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further.

The charter party provided only that the shipowner use due diligence to make the vessel seaworthy. The history and effect of the Harter Act, 46 U. S. C. §§ 190-196, and The Carriage of Goods by Sea Act, 46 U. S. C. §§ 1300-1315 (COGSA) incorporated in and made a part of the contract of charter party by paragraph 24 and the Clause Paramount are discussed at length in Knauth, *Ocean Bills of Lading* (4th ed. 1953) at pages 118-131, 158, 162-169 and in Gilmore & Black, *The Law of Admiralty* (1957), Ch. III Part II, pages 119-133 *et seq.* and Ch. IV, pages 170-176. In referring to sections 1303 and 1304 of COSGA Gilmore & Black state, at page 128:

> When the sections are read together, one interesting generality emerges. So far as these crucially

*Deletions and insertions are as made in the charter.

> important provisions go, the carrier's "insurer's" liability is a thing of the past. His liability for cargo damage must now be predicated on fault only.

At page 129 it is stated:

> Section 3(1) [§ 1303(1)] cuts down the warranty of seaworthiness to an obligation to use due diligence to make the vessel seaworthy.

Poor, *Charter Parties and Ocean Bills of Lading* (5th ed. 1968) states at page 167:

> The Act [COGSA] in effect abolishes the implied warranty of seaworthiness, which exists at common low, because the carrier is not liable for loss or damage due to unseaworthiness "unless caused by want of due diligence".

Although COGSA, by its own terms does not apply to charter parties, § 1305, Gilmore & Black state at page 175:

> There are no statutes in this country (or, generally, elsewhere) regulating the terms of charter parties, as the terms of bills of lading are regulated by the Carriage of Goods by Sea Act. It has been felt, apparently, that the bargaining power of charterers and owners is equal enough that they may be left to contract freely, a situation in sharp contrast to the great disparity between ship lines and the shippers of package cargo. . . . As a matter of practice, many charter party forms stipulate for the applicability of COGSA or the Harter Act to the charterer-owner relations; such stipulation is of course valid, and prevails even where no bill of lading is issued.

Virtually *all* charter parties contain some form of words from which a warranty of seaworthiness may be implied. To incorporate the terms of COGSA in a contract of affreightment is in accord with public policy, *Petition of Isbrandtsen Company, Inc.; The EDMUND FANNING,* 201 F. 2d 281 (2d Cir. 1953). Clause 24 of the charter party and the accompanying "U. S. A. Clause Paramount" effectively incorporated COGSA as terms of the charter, thereby reducing the implied warranty of seaworthiness to an obligation of due diligence to furnish a seaworthy vessel. *United States* v. *Wessel, Duval & Co.,* 115 F. Supp. 678 (S. D. N. Y. 1953); *United States* v. *The SOUTH STAR,* 115 F. Supp. 102 (S. D. N. Y. 1953); affirmed, 210 F. 2d 44 (2d Cir. 1954); *The QUARRINGTON COURT,* 36 F. Supp. 278 (S. D. N. Y. 1940); affirmed, 122 F. 2d 266 (2d Cir. 1941); *The TEMPLE BAR,* 45 F. Supp. 608 (D. Md. 1942); affirmed, 137 F. 2d 293 (4th Cir. 1943); *Horn* v. *Cia. de Navegacion Fruco, S.A.,* 404 F. 2d 422 (5th Cir. 1968); cert. den. 394 U. S. 943; *Adamastos Shipping Co., Ltd.* v. *Anglo-Saxon Petroleum Co., Ltd.* [1959] A. C. 133 (House of Lords). *United States* v. *Cia. Naviera Continental, S.A.,* 202 F. Supp. 698 (S. D. N. Y. 1962); *J. B. Effenson Co.* v. *Three Bays Corp.,* 238 F. 2d 611 (5th Cir. 1956). The words "This bill of lading . . ." in the Clause Paramount are to be treated as corrected so as to read "This charter-party . . ." *United States* v. *Wessel, Duval & Co., supra,* at pages 681, 182.

The provisions of COGSA, incorporated by clause 24 and the Clause Paramount, cutting down the warranty of seaworthiness to an obligation to use due diligence to make the vessel seaworthy, override any warranty implied from the language in clause 1. We are dealing with an implied warranty, not a typewritten insert or a specific printed warranty, a warranty which would be implied even in the

absence of clause 1; see, *Demsey & Associates, Inc.* v. *SS SEA STAR, supra.* The Clause Paramount, incorporating COGSA, provides in part:

> . . . nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading [charter party] be repugnant to said Act to any extent, such term shall be void to that extent, but no further.

The title "Clause Paramount" as used by the parties is important. "Paramount" is defined in *Webster's New Collegiate Dictionary* (1973) as: "superior to all others: SUPREME." In *Adamastos Shipping Co. Ltd.* v. *Anglo-Saxon Petroleum Co. Ltd.,* [1959] A. C. 133 (House of Lords), *supra* the court construed the same "Clause Paramount" that we have in the present case which was "to be incorporated in this charter-party." The charter-party also contained precisely the same language from which a warranty was implied in *Demsey, supra.* All the Lords agreed that "Bill of Lading" was to be read as "Charter-Party." In so ruling, Viscount Simonds said at page 154:

> My Lords, I should have come to this conclusion without the aid of any external circumstance. But I am confirmed in it by the notorious fact, to which both the learned judge and the editors of the 16th edition of Scrutton on Charterparties refer, that the parties to a charter party often wish to incorporate the Hague Rules* in their agreement: and by that I

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*COGSA is the United States enactment of the Hague Rules.

> do not mean, nor do they mean, that they wish to incorporate the ipsissima verba of those rules. They wish to import into the contractual relation between owners and charterers the same standard obligation, liability, right and immunity as under the rules subsists between carrier and shipper: in other words, they agree to impose upon the owners, in regard, for instance, to the seaworthiness of the chartered vessel, an obligation to use due diligence in place of the absolute obligation which would otherwise lie upon them.

In *United States* v. *Wessel, Duval & Co.*, 115 F. Supp. 678 (S. D. N. Y. 1953), *supra,* the charter party contained the same incorporation clause and Clause Paramount as the present case. At page 683 Judge Dimock said:

> I hold that the parties adopted the Carriage of Goods by Sea Act as part of the charter party.

And at page 684 he said:

> The United States' theory might be that there was a warranty of seaworthiness in the charter party, that the alleged unseaworthiness constituted a breach of the contract of carriage and therefore unseaworthiness could amount to a deviation. Unseaworthiness is excused under the Carriage of Goods by Sea Act, which is incorporated in the charter party, where the owner has used due diligence to make the ship seaworthy. 46 U. S. C. §§ 1303-4. I am not aware of any case holding that a contract term providing for such an excuse would be invalid.

In *Horn* v. *Cia de Navegacion Fruco, S. A.*, 404 F. 2d 422, (5th Cir. 1968), cert. denied, 394 U. S. 943, the charter party was "patterned after the New York Produce Ex-

change Charter Party" in use in the present case with substantially the same incorporation clause and the identical Clause Paramount. After referring to the implied warranty of seaworthiness the Court said at page 429:

> As was the situation here, the owner and the charterer sometimes chose to incorporate COGSA into the charter party. Such a practice serves to cut the general seaworthiness warranty "down to COGSA dimensions," that is, to the level of due diligence.

Gilmore & Black state, page 182, footnote 41:

> The incorporation by reference of COGSA in the charter party would of course cut the seaworthiness warranty down to COGSA dimensions.

In *Demsey & Associates, Inc.* v. *S. S. SEA STAR,* 321 F. Supp. 663 (S. D. N. Y. 1970); affirmed in part, reversed in part, 461 F. 2d 1009 (2d Cir. 1972) there was no issue and no discussion as to the warranty to be implied from clause 1 of the charter party and the modification thereof by the incorporation of COGSA. The District Court found that the vessel was unseaworthy, that the owner had not used due diligence to make her seaworthy and that there was breach of warranty implied from clause 1. In view of the finding of lack of due diligence the result would have been precisely the same under the COGSA obligations and the point was neither raised or discussed by either the District Court or this Court which affirmed the holding of the District Court in this respect. Indeed the issue of seaworthiness was so minor that this Court regarded the matter of unseaworthiness damages as relatively unimportant and said at page 1013:

> It may prove so difficult to ascertain the extent of this particular damage or it may be of so minor

a character that the parties may decide to overlook it.

The Court below seems to have ruled that although COGSA was incorporated in the charter so that COGSA became a part of the charter, nevertheless, a full warranty of seaworthiness remained. It ruled that there were in effect two warranties, one express and the other implied, that the incorporation of COGSA modified the implied warranty to one of due diligence, but that a full express warranty remained and that liability on both warranties was limited in amount to $500 per package. *Cf, Demsey & Associates, Inc.* v. *SS SEA STAR, supra;* see also, footnote at page 30, *supra.* The Clause Paramount specifically states that "nothing herein contained shall be deemed a surrender of any of its rights or liabilities under said Act". It further provided, "If any term of this bill of lading [to be read "charter party"] be repugnant to said Act to any extent, such term shall be void to that extent, but no further." The Court below gave full effect to comparable language in the bill of lading. The agreement between charterer and cargo did *not* contain comparable or "back to back" provisions because the agreement provided that if anything in the bill of lading, which incorporated COGSA, be found to be contrary to or inconsistent with the provisions of the agreement, the agreement shall be controlling. The charter party provided exactly the opposite: anything in the charter inconsistent with COGSA is void to the extent of such inconsistency. The rule that general language is subservient to specific language is merely a rule of construction to determine the actual intent of the parties. The objective to be obtained is the intent of the parties. As to this the well reasoned speech of Viscount Simonds in *Adamastos Shipping Co., supra,* concurred in

by three other Lords (of the five Lords sitting), as to matters material in the present case is persuasive. The pertinent portion is quoted at pages 34, 35, *supra.* It was clear to Viscount Simonds, and so held, that the same warranty as in the present case was modified to an obligation to use due diligence as this was the actual and expressed intent of the parties. In every case where the present or equivalent form of charter has been used, and where the issue has been whether the warranty of seaworthiness was modified to an obligation to use due diligence by the inclusion of the Clause Paramount, the ruling has been in accord with *Adamastos Shipping Co., supra.* The obligations of shipowner to charterer are cast in the same form as its obligations to cargo: the duties, obligations, rights, privileges and defenses as prescribed by COGSA, with an obligation of due diligence and the right of limitation of liability by reason of damage to cargo to $500 per package. The shipowner and charterer contemplated that shipowners' liability for damage to cargo should be delineated by COGSA limits, for they specifically agreed that all bills of lading should contain the Paramount Clause and that the signing of bills of lading should be "without prejudice to this Charter Party" (see typed insert to clause 8, exh. E. 2). In *The QUARRINGTON COURT, supra,* 122 F. 2d 266 at 267, this Court quoted the language of Judge Coxe:

> The charterparty between Isthmian and the Owner incorporated by reference the U. S. Carriage of Goods by Sea Act, and this addition to the printed form was made in handwriting in the margin. I know of no good reason why this provision should not be given effect insofar as Isthmian's present claim is concerned; it meant that the obligation to Isthmian with respect to claims based on cargo ship-

> ments was the same as that owed to holders of bills of lading governed by the Carriage of Goods by Sea Act; and it still allowed some scope to the warranty of seaworthiness contained in the charterparty.

This Court, 122 F. 2d 266 at 267, found it unnecessary to consider this point as charterer could not recover for any loss resulting from its own voluntary action and not from any breach of warranty contained in the charter party.

One of the most important features of COGSA was the modification of the former warranty of seaworthiness to an obligation to use due diligence. This is described by Gilmore and Black, *supra,* at page 128, as "crucially important". If effect to COGSA §§ 1303 and 1304 is not given, the intent of the parties will be violated and clause 24 of the charter will be emasculated. If New York Navigation by private contract with cargo has exposed itself to a greater liability, liability without limitation, then this is a breach of obligation such that there can be no indemnity by the shipowner, either for the excess liability or the costs of defense incident thereto. *The FALKEFJELL* v. *Arnold Bernstein Shipping Co.,* 223 F. 2d 820 (2d Cir. 1955); *Grace Lines, Inc.* v. *Central Gulf S. S. Corp.,* 416 F. 2d 977 (5th Cir. 1969); cert. denied, 398 U. S. 939; *The SARK,* 245 Fed. 909 (E. D. La. 1912); affirmed *per curiam,* 211 Fed. 1022 (5th Cir. 1914). See, Gilmore & Black, *supra,* page 208, note 128 where it is stated:

> Where the charterer procures the master's signature to bills of lading containing terms less favorable to the ship than those comprised in the charter party, and where the ship consequently incurs a liability, it has been held that the owner has a right of indemnity against the charterer. *Field Line* v. *South Atlantic S. S. Line,* 201 F. 301 (5th Cir. 1912).

See also, Gilmore & Black, *supra,* page 181, note 36:

> Generally speaking, the voyage charterer is responsible for the consequence of his own misperformance of any of his duties under the charter.

See also, Carver, *Carriage by Sea* § 434, page 374 (12th ed. 1971).

POINT III.

WEYERHAEUSER COMPANY (SHIPOWNER) SHOULD NOT BE REQUIRED TO INDEMNIFY NEW YORK NAVIGATION COMPANY (CHARTERER) FOR ATTORNEY'S FEES AND EXPENSES OF DEFENSE.

Cargo urges that under its agreement with New York Navigation there was a full warranty of seaworthiness, rather than a COGSA obligation to exercise due diligence to furnish a seaworthy vessel, and that such a warranty is not subject to the package limitation. Weyerhaeuser made no cross-claim against New York Navigation and was ready at all times to defend the claim of cargo, if cargo would drop its separate direct contract claim against New York Navigation. Cargo refused. New York Navigation Company should not recover attorney's fees arising out of the issue of its alleged separate, independent contractual liability.

CONCLUSION

The judgment entered herein should be modified and amended to delete the recovery from Weyerhaeuser Company of attorney's fees and expenses of defense by New York Navigation Company; except as so modified and amended said judgment should be affirmed.

Respectfully submitted,

SYMMERS, FISH & WARNER,
Attorneys for Weyerhaeuser, Company, Defendant-Appellee-Appellant,
Office and Post Office Address,
345 Park Avenue,
New York, N. Y. 10022,
(212) 751-6400.

Dated: New York, New York,
26 August 1974.

Service of three (3) copies of the within
is hereby admitted this 27 day of August
1974 Vaughn Lasley for Haven
Attorney for Defendant appellee
appellant

Service of three (3) copies of the within
is hereby admitted this day of
19 .

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AUG 27 1974
DONOVAN, DONOVAN
MALOOF & WALSH

Attorney for